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No. 91-1176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE HONORABLE H. WILLIAM CONSTANGY,
Petitioner,

v.

NORTH CAROLINA CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Does an "offended observer" of an alleged violation of the Establishment Clause of the First Amendment have standing under Article III to challenge that alleged violation?

2. Does the custom of a state district judge to open each daily courtroom session with a nonsectarian invocation violate the Establishment Clause of the First Amendment?

PARTIES

Petitioner accepts respondents' representation that, contrary to the caption in the opinion of the court below, the proper name of the organizational respondent is the North Carolina Civil Liberties Union.

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner, H. William Constangy, a state court judge, challenges respondents' standing, as "offended observers," to bring suit attacking his practice of opening daily court with a brief invocation. Pet. § I. Judge Constangy also seeks review of the court of appeals' holding that this nonsectarian invocation violates the Establishment Clause of the First Amendment. Pet. §§ II, III. Finally, Judge Constangy urges this Court, in the alternative, to grant review, vacate the decision below, and remand this case for further consideration in light of the forthcoming decision in *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991). Pet. § IV.

Respondents have presented no valid objection to review of the important questions presented in the case at bar.

ARGUMENT

I. THE CONCEPT OF "OFFENDED OBSERVER" STANDING UPON WHICH RESPONDENTS' SUIT RESTS CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The Question of Respondents' Standing is Properly before this Court.

Respondents concede, as they must, that the question of standing "cannot be waived" and "may be raised for the first time in this Court." Brief in Opposition at 8. Indeed, this Court is free to raise the issue *sua sponte*, *see Bender v. Williamsport Area School District*, 475 U.S. 534, 539-41, 546-47 (1986), even when the parties are prepared to concede standing, *id.* at 541. Furthermore, it is "the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). This obligation is jurisdictional, *Bender*,

475 U.S. at 546-47, and remains subject to scrutiny at any stage of litigation, *id.* at 547.[1]

B. Respondents Lack Standing.

Respondents make no effort to reconcile their status as "offended observers" with the "actual injury" requirement for standing under Article III of the Constitution. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 485-86 (1982) (Article III requires "actual injury"; the "psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing"). *See generally* Pet. § 1.

Respondents attempt to transmute this subjective offense—that they "have felt intimidated or offended by Judge Contagny's prayer," Brief in Opp. at 9—into "injury in fact" by emphasizing that the respondents have *inconvenienced themselves* in order to avoid hearing the judge's daily invocation. *Id.* at 3-4, 9-10. Such voluntary, self-imposed maneuvers, however, cannot suffice to manufacture standing. Pet. at 12-13. If the *reaction* of an offended observer were to suffice for Article III purposes, any would-be litigant could challenge any government action simply by *responding* in some way. Thus, "injury in fact" would exist whenever a government official's mention of God in a public speech prompted someone to avoid attending an official event, or whenever some government program provoked a citizen into contributing money to an organization promoting contrary goals. Even going to the

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[1] Respondents cite no case to the contrary. The only case respondents cite to support their novel claim of "estoppel" is a Fourth Amendment case having nothing to do with Article III standing.

Respondents accuse Judge Constangy of deliberately neglecting the standing issue in the lower courts and seeking to "ambush" respondents in this Court. Brief in Opp. at 9. In so doing, respondents ignore the fact that Judge Constangy retained new counsel to prepare the petition to this Court. Counsel are ethically obligated to represent Judge Constangy zealously; counsel certainly are *not* obligated to overlook such a serious jurisdictional defect as respondents' lack of standing.

trouble of filing suit could be deemed an "injury" sufficient to confer standing. Obviously, such a rationale would eliminate standing as a meaningful concept.

The undertaking of evasive countermeasures represents an exercise of liberty, not an injury in fact.[2]

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *MARSH v. CHAMBERS*.

The court below struck down Judge Constangy's practice of opening daily court with an invocation. This decision conflicts directly with *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court upheld as constitutional the practice of the Nebraska legislature to open daily sessions with a prayer by a paid chaplain.

This Court noted in *Marsh* that the "opening of sessions of legislative *and other deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786 (emphasis added). The Court specifically cited, as examples of "other deliberative public bodies," the federal courts, *id.*, which traditionally open proceedings with the invocation, "God save the United States and this Honorable Court," *id.* Judge Constangy has likewise documented a practice of using invocations, in federal judicial proceedings, which dates back to the period both immediately before and subsequent to the passage of the Bill of Rights. Pet. at 16-19.

Marsh found the historical practice of public invocations to be decisive of the question whether the Establish-

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[2] Respondents' list of six supposedly "comparable" cases, Brief in Opp. at 10, is not comparable at all. None of these cases hold that "offended observers" have standing, whether they engage in evasive maneuvers or not. Four of these cases involved allegedly unconstitutional practices in public schools. The present case, by contrast, involves neither parents nor impressionable children, *see* Pet. at 12 n.10, and none of the respondents claim standing as a parent. (Respondents' repeated and unsupported assertion that the present case involves children, Brief in Opp. at 10, 25, is simply incorrect.) The other two cases respondents cite did not even discuss standing.

ment Clause permitted such practices. The lower court's rejection of Judge Constangy's daily invocation is therefore irreconcilable with *Marsh*.

Respondents, like the court below, seek to dismiss *Marsh* as a "singular case," Brief in Opp. at 20, with virtually no precedential value outside its particular facts, *id.* at 20-22. But even if this grudging view of *Marsh* were justified—which it is not—the fact would remain that the practice of opening court with an invocation comes within the very core of the rationale of *Marsh*.

Respondents seek to evade *Marsh* by claiming that courtroom invocations have a "greater potential for an establishment of religion" than do legislative invocations. Brief in Opp. at 24 (internal quotation marks omitted; quoting court of appeals, *see* Pet. App. 8a). But this argument is both irrelevant and incorrect. Pet. at 19-20. If, as this Court held in *Marsh*, 463 U.S. at 795, the threat of establishment of religion by means of invocations is "mere shadow," then a comparison of legislative and judicial "shadows," to see which is less insignificant, is absurd. Furthermore, the text of the Establishment Clause itself focuses on "Congress" making "law," which would indicate—if anything—that the potential for establishment is greatest with the *legislative* branch, not the judiciary.

Respondents' assertion that Judge Constangy, merely by reciting an invocation, "compels the litigants and attorneys who appear before him to worship his God, just as if he were compelling them to attend church," Brief in Opp. at 26, is nonsensical and flatly contrary to *Marsh*.

The conflict of the decision below with *Marsh* could not be greater without the court of appeals expressly repudiating *Marsh*.

III. THIS CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS REGARDING THE *LEMON* TEST UNDER THE ESTABLISHMENT CLAUSE.

The court of appeals applied an extreme and expansive version of the *Lemon* test in the case at bar. Pet.

§ III(A). In the name of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court below held that the Establishment Clause forbids any action by a government official which: a) reflects a personal religious purpose, Pet. at 21-22; b) is perceived by objecting individuals as having the "effect" of endorsing religion, *id.* at 23; or, c) has religious significance, *id.* at 24-25. This Court should grant review to examine the legitimacy of this exaggerated version of *Lemon*.

Respondents' defense of the court below actually highlights the extremity of that court's ruling.

A. "Purpose" Prong.

The court of appeals construed the "purpose" prong of *Lemon* to require a factual inquiry into "Judge Constangy's actual intent," *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (Pet. App. 11a).[3] Properly construed, however, *Lemon* requires no such subjective inquiry: what is relevant is the objective governmental purpose, not the subjective motivations of public officials. *See* Pet. at 21-22.

Respondents counter by labeling invocations as *per se* unconstitutionally tainted by a religious purpose: "Under any 'objective' standard, prayer is a religious act, wholly lacking in secular purpose." Brief in Opp. at 14. This *per se* rule, however, flies squarely in the face of *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld legislative prayers. (Respondents' rigid version of *Lemon* also would automatically invalidate all official invocations, including the cry, "God save this Honorable Court.")

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[3] Respondents likewise equate personal religious motivations with an unconstitutional "purpose" under *Lemon*. Brief in Opp. at 5-6. Such an equation is completely incompatible with religious liberty. Pet. at 21-22. Judge Constangy therefore properly resisted the efforts of respondents' counsel to press ambiguous questions about "religious purpose" without clarifying whether counsel meant "purpose" under *Lemon* (a conclusion of law) or simply personal motivation. Pet. at 22 n.15.

The court below held that, to survive the *Lemon* "purpose" test, the challenged activity must be strictly *necessary* and *effective* for the fulfillment of the asserted secular purpose. *See* Brief in Opp. at 12. In the case at bar, Judge Constangy explained that one of the purposes of the daily invocation was to "produce a calm, quiet, serious atmosphere in the courtroom for the day," Tr. 54. This is plainly a legitimate secular purpose. *See Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (secular purpose of invocations). Yet the court below rejected this secular purpose for two reasons: first, Judge Constangy did not repeat the invocation in the afternoon, and therefore the invocation must not really be *necessary*, 947 F.2d at 1150 (Pet. App. 10a);[4] and second, the atmosphere during the afternoon session and in other judges' courtrooms was no different from the atmosphere in Judge Constangy's courtroom during the morning session, and therefore the invocation must not really be *effective*, *id.* (Pet. App. 11a).

This Court has never required a governmental purpose to be not only secular, but also demonstrably both *necessary* and *effective*. *E.g.*, *Lynch*, 465 U.S. at 681 n.7 ("irrelevant" whether inclusion of Nativity scene in municipal display is necessary in order to fulfill asserted secular purpose). Such a strict test would invalidate not only all invocations at public events, but also all ceremonial or commemorative religious references (e.g., inscriptions on monuments, the motto "In God We Trust," the phrase "under God" in the pledge of allegiance, and so forth).

B. "Effect" Prong.

The court of appeals construed the "primary effect" prong of *Lemon* to require a factual "focus" on how Judge Constangy's invocation "was perceived." 947 F.2d at 1151 (Pet. App. 12a). If an observer perceives a

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[4] Both respondents and the court of appeals neglect to mention that this Court similarly uses the invocation, "God save this Honorable Court," only in morning sessions.

"message of endorsement of religion," *id.*, the challenged practice is unconstitutional, *id.*

This version of *Lemon*'s "effect" prong essentially creates a heckler's veto over any activity that an atheist (or anyone else) might find objectionable. Pet. at 23. This Court has never embraced such a view. *See, e.g.*, *Lynch*, 465 U.S. at 683 (no unconstitutional "effect" just because "some observers may perceive that the city has aligned itself with the Christian faith"). Respondents attempt to limit this "veto" doctrine by suggesting that the offended observer's perception of an endorsement of religion must be "reasonable," Brief in Opp. at 15-16; respondents, however, offer no principled basis for classifying the perceptions of the scrupulous separationist as objectively "unreasonable."

Respondents claim to distinguish such commonplace official acknowledgements of God as the motto on currency and the opening cry of this Court on the basis that these practices represent "deistic references that have lost their religious meaning." Brief in Opp. at 16-17. This is tantamount to arguing that government officials may only invoke God when they take His Name in vain. The Establishment Clause, however, does not require "callous indifference" to religious matters. *Lynch*, 465 U.S. at 673 (citation omitted). Nor may the Establishment Clause "be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concuring in judgment).

Invocations are not constitutionally taboo. By condemning Judge Constangy's opening invocation as "a religious act," 947 F.2d at 1151 (Pet. App. 13a), the court below stretched the "effect" prong of *Lemon* beyond constitutional limits.

C. "Entanglement" Prong.

The court of appeals construed the "entanglement" prong of *Lemon* to forbid identifiably religious activity by public officials. The court ruled that Judge Constangy's

daily invocation produced a "merging of judicial and religious functions" and impermissibly risked creating "divisiveness along religious lines." 947 F.2d at 1152 (Pet. App. 15a) In so ruling, the court below seriously misconstrued and misapplied the "entanglement" prong of the *Lemon* test. Pet. at 24-25.

In the first place, this Court has flatly stated that the political divisiveness test "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983). *Accord Lynch*, 465 U.S. at 684; *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987). The court below simply ignored these decisions, holding that there was an unconstitutional risk of political divisiveness despite the complete absence of any subsidies to parochial schools. Respondents lamely defend the court below; however, respondents provide no relevant authority that might justify this clear departure from the teaching of this Court. Brief in Opp. at 18-19.

The court below also erred in construing the "entanglement" prong to require the elimination of all traces of religion from official activities. The "entanglement" prong forbids interference with religious organizations by means of extensive monitoring of their functions. *See Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988) (and cases cited). While *Lemon* employed the phrase "government entanglement with religion," 403 U.S. at 613, both *Lemon* and subsequent cases clarify that it is more accurate to describe the test as forbiding "excessive entanglement between *church* and state," *Bowen*, 487 U.S. at 602 (emphasis added), not merely "*religion* and state," as respondents claim, Brief in Opp. at 18.

The court of appeals itself acknowledged that "entanglement" focuses upon "a problem of government involvement in the affairs of a particular religious organization." 947 F.2d at 1152 (Pet. App. 15a). The present case, however, involves no religious institutions or aid to

parochial schools; hence, there is no danger of "intensive monitoring" of such entities, *Bowen*, 487 U.S. at 616, and the "entanglement" prong does not properly apply.

D. Validity and Scope of the *Lemon* Test.

The present case, as amply illustrated in the foregoing analysis and in Judge Constangy's petition for review, sharply implicates both the scope and the validity of the *Lemon* test. Pet. at 26-27. This Court should grant review to settle this important and recurring issue. *Id.*

Respondents assert that under *any* version of *Lemon* or proposed alternative tests for applying the Establishment Clause, Judge Constangy's daily courtroom invocation would be unconstitutional. Brief in Opp. at 27-29. The analysis respondents offer, however, does no more than import into these alternative tests the same erroneously strict separationism that infects the decision below. Indeed, respondents go so far as to condemn anything that creates a "risk of making religion relevant" to government activity. *Id.* at 29. This Court has forcefully rejected such extremism. *Lynch*, 465 U.S. at 678 ("an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court").

IV. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT REVIEW, VACATE THE DECISION BELOW, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *LEE v. WEISMAN*.

The case of *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991), now pending before this Court, features issues that heavily overlap the issues presented in Judge Constangy's petition for review. Pet. § IV. (The prominent exception is the standing issue in the present petition, which independently merits review.) Therefore, this Court should either grant plenary review in the case at bar or vacate the decision below and remand for further consideration in light of *Lee v. Weisman*.

Respondents do not even cite *Lee*, much less discuss the case or try to explain why the forthcoming *Lee* decision should have no bearing upon the disposition of the present case. But the fact remains that *Lee*, like the case at bar, involves: a) a challenge to a public invocation; b) the application of the Establishment Clause to such an invocation; and, c) the scope and validity of the *Lemon* test. *See* Pet. at 28 (questions presented in *Lee*). Disposition of the present petition should not be divorced from this Court's resolution of the closely related *Lee* case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fourth Circuit or, in the alternative, grant the petition, vacate the decision of the court of appeals, and remand this case for further consideration in light of the decision of this Court in *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991).

Respectfully submitted,

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